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NO.

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

H. G. NIXON, as Administrator of the Estate of Lillian T. Nixon, deceased,

Petitioner,

vs.

MARGARET HECKLER, Secretary, Department of Health and Human Services,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DOES THE DISTRICT COURT HAVE JURISDICTION IN A SUIT AGAINST THE SECRETARY OF HEALTH AND HUMAN SERVICES FOR DAMAGES ARISING OUT OF THE VIOLATION OF PROCEDURAL DUE PROCESS WHEN THE PLAINTIFF'S DECEDENT WAS GIVEN FALSE REASONS FOR A DENIAL OF BENEFITS?

PARTIES BELOW

Parties in the Court of Appeals were Appellant H. G. Nixon as Administrator of the Estate of Lillian T. Nixon, Deceased, and Appellee Margaret M. Heckler, Secretary of United States Department of Health and Human Services.

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OPINIONS BELOW

The recommendation of the Magistrate in the District Court is printed as Appendix B. It was adopted by order of the District Court dismissing the cause which is printed as Appendix C. The

Order of the United States Court of Appeals for the Eleventh Circuit affirming the District Court is attached hereto as Appendix A. Thus the recommendation of the Magistrate essentially constitutes the opinion below.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The order by the Court of Appeals for the Eleventh Circuit was entered on August 14, 1985. Petitioner has 90 days to file its Petition for Writ of Certiorari with this Court. 28 U.S.C. § 2101(c). Therefore, this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

****

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, Amendment V

******

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331

******

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of

such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary

as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there

is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other

civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. § 405(g)

******

The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 1331 or 1346 of Title 28 to recover on any claim arising under this

subchapter.

42 U.S.C. § 405(h)

******

We shall mail a written notice of the initial determination to you at your last known address. The reasons for the initial determination and the effect of the initial determination will be stated in the notice. The notice also informs you of the right to a reconsideration or to a hearing. We will not mail a notice if the beneficiary's entitlement to benefits has ended because of his or her death.

20 C.F.R. § 404.904

******

Reconsideration is the first step in the administrative review process that we provide if you are dissatisfied with the initial determination. However, if the

initial determination is that your blindness or disability has ceased due to medical reasons, and you have a right to a hearing on the same issue in connection with a claim for supplemental security income benefits, your first step is to request a hearing right after the initial determination. If you are dissatisfied with our reconsidered determination, you may request a hearing.

20 C.F.R. § 404.907

******

(a) General. If you are applying for benefits and do not have a good reason for failing or refusing to take part in a consultative examination or test which we arrange for you to get information we need to determine your disability or blindness, we may find that you are not disabled or blind. If you are already receiving benefits and do not have a good

reason for failing or refusing to take part in a consultative examination or test which we arranged for you, we may determine that your disability or blindness has stopped because of your failure or refusal. Therefore, if you have any reason why you cannot go for the scheduled appointment, you should tell us about this as soon as possible before the examination date. If you have a good reason, we will schedule another examination.

(b) Examples of good reasons for failure to appear. Some examples of what we consider good reasons for not going to a scheduled examination include --

(1) Illness on the date of the scheduled examination or test;

(2) Not receiving timely notice of the scheduled examination or test, or receiving no notice at all;

(3) Being furnished incorrect or incomplete information, or being given incorrect information about the physician involved or the time or place of the examination or test, or;

(4) Having had death or serious illness occur in your immediate family.

(c) Objections by your physician. If any of your treating physicians tell you that you should not take the examination or test, you should tell us at once. In many cases, we may be able to get the information we need in another way. Your physician may agree to another type of examination for the same purpose.

20 C.F.R. § 404.1518

STATEMENT OF THE CASE

This suit arises out of a denial of procedural due process by the Social Security Administration ("Social Security") by giving Mrs. Lillian T. Nixon ("Mrs. Nixon") a false reason for terminating her disability benefits and denying her an effective opportunity to be heard.

The facts relevant to this case are evidenced by documents from Social Security files which were filed in the District Court in support of the respondent's motion for summary judgment.

In early August 1981, Mrs. Lillian T. Nixon received a notice from the Social Security that the disability payments which she had been receiving for over ten years were being re-evaluated. She was invited to provide medical evidence of

her continuing disability.

Under the applicable procedure the medical evaluations are turned over to the Disability Determination Division of the State of Alabama ("DDD") which recommends actions to be taken by Social Security. The formal action of denial and the notice which provides the gravamen of this action was thus taken by Social Security and not by the DDD.

Mrs. Nixon submitted evidence of her continuing disability to the DDD and a consultant, a doctor hired by the DDD, concluded that she was disabled. The DDD contended that it asked Mrs. Nixon to visit another doctor and another hospital for second opinions, but she missed the appointments.[1/]

[1/] There is no evidence in the record that Mrs. Nixon was ever notified of the appointments. The DDD's consulting physician said that she was too sick to attend anyway. (Appendix F)

On December 7, 1981, the DDD wrote Social Security recommending that the benefits be terminated and stated the true reason for the termination of benefits:

> Considering all evidence of record, medical documentation is not sufficient to determine the current severity of the claimant's impairments. Therefore it is recommended that disability benefits be ceased since the claimant failed to report to consultative examinations. (emphasis added)

Acting on the basis of the DDD recommendation, Social Security notified Mrs. Nixon that her benefits had been denied but gave a false reason for denial. Social Security's termination letter to her stated the following reason for termination:

> The medical evidence in your case shows that you became able to do substantial gainful work in October 1981. (Appendix E)

Mrs. Nixon appealed for reconsideration, but her approach was limited to insisting that she was disabled. Neither DDD nor Social Security ever indicated to Mrs. Nixon that her benefits were being terminated solely because she failed to show up for doctor and hospital appointments or that she could show "good reasons" for her not seeing the doctor and her benefits would be restored.

On February 19, 1982, Mrs. Nixon died. Upon learning that Mrs. Nixon died, the Social Security re-opened the case and changed its position. A notice was prepared affirming that she was no longer disabled, but, apparently upon learning of her death, Social Security amended the final notice by allowing her benefits to continue up to her death and disclosed for the first time the true reason for the previous denial of benefits:

> This decision reopens, revises and reverses the decision of December 2, 1981. The termination of benefits was based on insufficient evidence based on failure to appear for a consultative examination. Her physician stated that she was unable to go to an examination due to weakness. (emphasis added) (Appendix F)

Subsequently, on February 21, 1984, Mrs. Nixon's widower, H. G. Nixon ("Petitioner") filed suit in the United States District Court for the Southern District of Alabama, Northern Division, as Administrator of the Estate of Lillian T. Nixon against the Secretary of Health and Human Services, Margaret M. Heckler, claiming that the death of Mrs. Nixon was the result of the willful, wanton, malicious, incorrect and unlawful act of the Secretary who issued from her office the Termination Notice which caused the physical seizure from which Mrs. Nixon

died.[2/] No claim was made in the lawsuit for benefits. Indeed, her benefits have been paid. The complaint rested its jurisdictional allegation on 28 U.S.C. § 1331 and under the Federal Tort Claims Act.[3/]

[2/] There is no complaint in this case that the DDD acted outside its authority in recommending termination. The thrust of this case involves the false and deceptive notice which is the responsibility of Social Security.

[3/] Petitioner recognizes that Mrs. Heckler might in fact not be the proper defendant in this case and that some other official lower in the chain of command should be substituted. If this notice was issued pursuant to standard instructions or course of practice, then Mrs. Heckler is the appropriate party. Ellis v. Blum, 643 F.2d 68 (2nd Cir. 1981). Otherwise, some other individual might be required to be the responsible party. The government's motion for summary judgment did not raise that issue, factually or legally, either in the motion or on appeal. Because the motion was filed very soon after the litigation was commenced, plaintiff has not had the benefit of discovery which would permit identifying with specificity
(continued on page 18)

The defendant filed a motion to dismiss, or, in the alternative, motion for summary judgment, in the trial court and submitted various records and affidavits in support of the motion. The matter was referred to a magistrate who recommended on December 6, 1984, that the cause be dismissed on the ground that the district court had no jurisdiction to entertain the claim. He relied solely on the provisions of 42 U.S.C. § 405(h).[4]

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[3] (continued from page 17) the Secretary's responsibility. If the Secretary is not the proper party, the defect is not fatal because the rules of civil procedure permit a substitution of defendants when the United States Attorney has been served. Fed.R.Civ.P. Rule 15(c).

Petitioner is not here insisting on its Federal Torts Claim Act claim.

[4] Ironically, the Magistrate cited as sole authority for his decision the case of Ostroff v. State of Florida, 554 F. Supp. 347 (M.D. Fla. 1983), which recognized the jurisdiction of Federal courts to bring damage suits for violation of procedural due process by the Social Security. See Appendix D.

Petitioner's counsel filed timely objection to the recommendation by means of a letter to the Honorable William Brevard Hand, Chief Judge of the U. S. District Court for the Southern District of Alabama. (Appendix D). On January 10, 1985, the District Court adopted the recommendation of the Magistrate and dismissed the cause for want of subject matter jurisdiction. (Appendix C)

On February 1, 1985, Petitioner filed timely appeal to the United States Court of Appeals for the Eleventh Circuit, and on August 14, 1985, the Eleventh Circuit affirmed the decision of the U. S. District Court for the Southern District of Alabama without a written opinion. (Appendix A) The issue of jurisdiction of the United States District Court was raised at every stage of the proceedings.

Petitioner now prays that a writ of

certiorari issue to review the judgment of the Eleventh Circuit affirming the dismissal by the District Court.

REASONS FOR GRANTING THE WRIT

The essence of this case involves the jurisdiction of the federal courts for a claim for consequential damages growing out of the denial of due process by Social Security. By extending the umbrella of § 405(h) of the Social Security Act, the Eleventh Circuit has failed to recognize the constitutional tort arising out of a denial of procedural process and the jurisdiction of the federal courts to try a claim for such a tort.

The Petitioner submits that (1) the actions of Social Security constitute a violation of procedural due process; (2) there is a substantive cause of

action for damages growing out of a violation of procedural due process; (3) the Social Security Act does not preclude a claim for consequential damages growing out of a violation of procedural due process; (4) the decision of the court below conflicts with the decision of the Second Circuit Court of Appeals.

1. The Actions by Social Security Violate Due Process

The Secretary's own regulations require that notice be given to the disability beneficiary of the reasons for the initial determination that the benefits will be terminated. 20 C.F.R. § 404.904. The beneficiary is then afforded an opportunity to seek reconsideration of the denial. 20 C.F.R. § 404.907. The regulations also make clear that when a beneficiary fails to show up

for a medical evaluation, Social Security is authorized to terminate benefits. 20 C.F.R. § 404.1518. However, the beneficiary is also afforded an opportunity under the regulations to present to Social Security "good reasons" for failing to appear; in which case the beneficiary may either reschedule an appointment or be excused totally from the appointment based on the circumstances. 20 C.F.R. § 404.1518.

The true reason for denial of Mrs. Nixon's benefits was the missed medical appointments. Had she been notified of the true reason, she would have been allowed the opportunity to explain her absence. Having been given a false notice, Mrs. Nixon was denied a meaningful opportunity to be heard. Appealing for reconsideration on the false premise that an actual determination had been

made that she was medically able to return to work, she submitted additional evidence of disability.

The Supreme Court has unequivocally stated that due process is not served unless an individual is given the reason for government action. In Goldberg v. Kelly, 397 U.S. 254 (1970) this Court stated as follows:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. (emphasis added)

394 U.S. at 270, quoting Greene v. McElroy, 360 U.S. 474, 496-497 (1959).

An individual's interest in continued receipt of Social Security benefits is a statutorily created property interest which is protected by the due process

clause of the Fifth Amendment, and is "entirely collateral to his substantive claim of entitlement." Mathews v. Eldridge, 424 U.S. 319, 329 (1976).

The Supreme Court described due process as "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'". Mathews v. Eldridge, supra; Goldberg v. Kelly, supra, quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). If due process was afforded Mrs. Nixon after her death, it was hardly a meaningful time. Her appeal for reconsideration was not afforded in a "meaningful manner" because an appeal based on incorrect grounds is a meaningless appeal.

2. There is a Substantive Cause of Action for Violation of Due Process.

Petitioner's cause of action is a constitutional claim derived from the

authority of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the landmark case recognizing an action for damages because of violation of the Fourth Amendment by a federal agent acting under color of his authority. This court recognized that the right to money damages is derived from Marbury v. Madison, 1 Cranch 137 (1803) which established judicial supremacy in interpretation of the United States Constitution.

The Bivens rationale has been extended to due process actions. In Carey v. Piphus, 435 U.S. 247 (1978) this Court upheld awarding damages for emotional distress which result from a denial of due process, whether or not the adverse action (the suspension of public students from school), turned out to be justified. In Davis v. Passman, 442 U.S. 229

(1979), a cause of action for damages was permitted against a congressman who allegedly dismissed his female deputy administrative assistant because of sex discrimination. Moreover, this Court has approved damage actions for death caused by violation of constitutional rights. Carlson v. Green, 446 U.S. 14 (1980) (alleged failure to provide proper medical attention to prison inmates).

The Bivens opinion discusses two possible instances where jurisdiction over the tort claim might be defeated. First, there might be "special factors counselling hesitation in the absence of affirmative action by Congress". Bivens, supra at 396. In Carlson v. Green, 446 U.S. 14, 19 (1980), this Court elucidated on that exception by indicating that the defendants must enjoy "such independent status in our constitutional scheme as to

suggest that judicially created remedies against them might be inappropriate." Carlson, supra at 19, citing Davis v. Passman. Petitioner is hard pressed to envision the type entity which would have such independence as to be exempted from responsibility for unconstitutional action. Suffice it to say, however, that no special factor appears to rescue the defendant in this case on such a basis.

Second, defendants might show "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Bivens, supra at 397.

The absence of a remedy for violation of due process is underscored by the

facts of this case. Mrs. Nixon's benefits have been restored for the brief time up to her death. She is deceased nonetheless and no remedy is proffered by Social Security to compensate for the loss occasioned by the role played by them in her demise.

3. The Social Security Act Does Not Preclude this Action.

Mr. Nixon is not seeking benefits. He is not challenging any substantive regulatory construction which provides a basis for the allowance of benefits. Mrs. Nixon pursued the administrative process as long as she lived. The claim in this case seeks the compensatory damages which flow from what the magistrate characterized as "bureaucratic bull-headedness" of Social Security. (Appendix B) A less colorful but more apt description of the conduct of the

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defendant in this case would be "denial of procedural due process."

The decision below apparently equates a damage action relating to violation of due process with a specific procedure for handling of claims for benefits and appeals to the Federal District Court after a final decision by the Secretary on denial of benefits. 42 U.S.C. § 405(g). The petitioner maintains this action is not a "claim arising under" the Act. 42 U.S.C. § 405(h). Thus, the Social Security Act does not prevent the filing of this action.

The decisions of this Court have laid out the criteria for preclusion of actions under §405(h), and this case falls squarely outside of them.

In Weinberger v. Salfi, 422 U.S. 749 (1975), the Court denied a class action challenging the constitutionality of a

Social Security ruling denying a widow and child benefits, when the widow had been married to her deceased husband for less than six months. The Court ruled that this was a claim arising under the Act, noting that the remedy sought was the award of benefits and that the Social Security Act provides "both the standing and the substantive basis for the presentation of their Constitutional contentions." The fact that the claim also involved a constitutional question did not permit the plaintiff an avenue of escape from the exhaustion of remedies requirements of the Act, because the constitutional claims would be raised in the statutorily provided administrative procedures of the Act.

Heckler v. Ringer, 52 U.S.L.W. 4547 (1984) established that the Salfi ruling was not limited to actions where the

specific remedy was a recovery of benefits but also injunctive and declaratory relief wherein the object was to obtain a substantive ruling with respect to benefits. In that case, the plaintiffs were attempting to review the directive that Medicare benefits for the bilateral carotid body resection surgery were not payable because the surgery was not reasonable and necessary.[5/] The plaintiffs had failed to exhaust their administrative remedies. With respect to one of the plaintiffs, Ringer, the Court stated, "Although it is true that Ringer is not seeking the immediate payment of benefits, he is clearly seeking to establish a right to future payments should he

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[5/] 42 U.S.C. 405(h) is made applicable to the Medicare Act by 42 U.S.C. § 1395(ii)

ultimately decide to proceed with BCBR surgery."

From these two decisions can be deduced a standard that when it is the purpose of an action to obtain benefits, then the administrative procedures must be employed. The Secretary must have an opportunity to utilize her own processes to deal with the substantive questions of entitlement raised by a particular claimant. In this case there has been a final determination on benefits which completed the decision-making process on the substantive issue of entitlement.

Exhaustion of remedies is not involved either, because the Petitioner has no administrative remedy. Jurisdiction for a claim for emotional distress resulting from a denial of due process cannot be grounded on § 405(g). "Constitutional questions obviously are unsuited to

resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. . ." Califano v. Sanders, 430 U.S. 99, 109 (1977).

This court has explicitly recognized that government officers are to be accountable for their constitutional torts, when the defendant is a Congressman, Davis v. Passman, 442 U.S. 228 (1979), a prison official, Carlson v. Green, 446 U.S. 14 (1980), a school official, Carey v. Piphus, 435 U.S. 247 (1978) and a narcotic agent Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). We are unaware of any constitutional or statutory principle which suggest that that Social Security officials enjoy an immunity from the consequences of their unconstitutional action which is not

otherwise extended to other government officials.

4. There is a Conflict of the Circuits.

The Eleventh Circuit's denial of federal question jurisdiction conflicts directly with Judge Friendly's analysis of similar facts in Ellis v. Blum, 643 F. 2d 68,76 (2d Cir. 1981). In that case the recipient claimed, among other things, damages for anxiety and physical harm caused by the Social Security's telephonic termination procedures. The recipient did not submit any evidence to contest the proposed termination because she was unable to remember the evidence which the Social Security had told her that they relied upon.

In analyzing the jurisdictional issue, the Second Circuit concluded, inter alia, that § 405(h) did not bar the recipient's

cause of action for damages against the Secretary of Health and Human Services grounded on 28 U.S.C. § 1331, since it would not be a claim "arising under" the Social Security Act, and there was no reason to preclude federal question jurisdiction. The court ruled that if the recipient would amend her complaint to state a claim for emotional distress and physical harm against the Secretary of Health and Human Services, there would be a cause of action for damages based on federal question jurisdiction under the authority of Bivens.

CONCLUSION

The Court below has permitted an over-extension of the requirement of exhaustion of remedies so that protection against unconstitutional conduct has been obliterated. We respectfully request

that this misapplication of law be reversed and petition of certiorari be granted.

Respectfully submitted,

L. Vastine Stabler

L. Vastine Stabler, Jr.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-7115
Non-Argument Calendar*

H.G. NIXON, as Administrator of the Estate of LILLIAN T. NIXON, Deceased,

Plaintiff-Appellant,

versus

MARGARET HECKLER, Secretary, Dept. of Health & Human Services

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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(August 14, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

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*Fed. R. App. P. 34(a); 11th Cir. R. 23

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

H. G. NIXON, :

Plaintiff :

vs. : CA 84-0186-H-B

MARGARET M. HECKLER, :
Secretary of Health
and Human Services, :

Defendant. :

RECOMMENDATION OF MAGISTRATE

Plaintiff filed suit in this Court against the Secretary of Health and Human Services, claiming that his wife was killed by the Government's alleged ham-handedness in cutting her from the disability rolls. If the claims alleged are true, the case would be an unusually stark example of Federal Government bureaucratic bull-headedness.

The problem with the case, though, is jurisdictional. A federal court is

supposed to allow suit against the Federal Government only where Congress tells us to do so, and in this case Congress told us in 42 U.S.C. § 405(h) that a suit of this kind cannot be maintained, Ostroff v. State of Florida, 554 F. Supp. 347 (M.D. Fla. 1983).

Accordingly, the Magistrate recommends that this case be dismissed for want of jurisdiction.

For a full explanation of procedural rights, see the attached sheet.

DONE this 6th day of December, 1984.

DAVID A. BAGWELL
United States Magistrate

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

H. G. NIXON,)

Plaintiff)

vs.) CA 84-0186-H-B

MARGARET M. HECKLER,)

Defendant.)

O R D E R

Upon the recommendation of the Magistrate, which is hereby adopted as the opinion of the Court, this cause is DISMISSED for want of subject matter jurisdiction. This dismissal is with prejudice, each party to bear its own costs.

IT IS SO ORDERED.

DONE this 10th day of January, 1985.

W. B. HAND
Chief Judge

APPENDIX D

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December 21, 1984

Honorable William Brevard Hand
Chief Judge
United States District Court
Southern District of Alabama
P. O. Box 1964
Mobile, Alabama 36633

RE: H. G. Nixon v. Margaret M. Heckler, Secretary of Health and Human Services; Civil Action No. 84-0186-H-B

Dear Judge Hand:

I write you to address the jurisdictional question raised by United States Magistrate David A. Bagwell in his recommendation of December 6, 1984.

Our principal difficulty with the recommendation is that the magistrate assumes that the elements of our action include a claim arising under the Social

Security Act. Plaintiff, is not claiming benefits under the Act. Plaintiff is not claiming liability simply because of a denial of benefits. The essence of the claim is that Mrs. Nixon was entitled to certain constitutional rights in her dealings with the Social Security Administration. Due process required that she be afforded notice of the basis of denial of her claim and that she be given an opportunity to be heard on reconsideration of her claim. The government's own documents show that she was not given her constitutional rights. The state disability determination unit turned Mrs. Nixon down because she failed to meet an appointment with a doctor. She was not found to be disabled. The defendant's agents, however, falsely told her that she was rejected because of a finding that she was no longer disabled.

Because she was not told the truth as to why she was turned down, she did not have an opportunity to be heard on the reason for her rejection. Had she been told the truth, she would have been permitted to demonstrate that she was physically unable to come to Montgomery for a doctor's appointment or she might have seen the doctor and preserved her pension, but she was never informed of what was necessary to protect her pension.

The United States Supreme Court has recognized that the Federal Courts have jurisdiction to hear damage claims of individuals who have been injured as a result of conduct by Federal agents who have denied the plaintiffs their constitutional rights. The leading case is Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) and the provision of

the Social Security Act are irrelevant to jurisdiction in that type of case.

The case upon which the magistrate relies, Ostroff v. State of Florida, 554 F. Supp. 347 (M.D. Fla. 1983) is in fact authority that the jurisdiction of the Federal Court in a suit against defendants acting under color of federal authority is derived directly from the United States Constitution when the cause of action is based on a violation of procedural due process. Thus, the court's jurisdiction is entirely independent of the provisions of the Social Security Act, which, in § 405(g) and (h) lays down exclusive procedures to be followed in the event of a violation of the substantive provisions of that Act, as opposed to the Nixon claim of a violation of procedural due process pursuant to the Fifth Amendment to the Constitution.

In Ostroff, the claim for damages was predicated upon the allegedly wrongful termination of Social Security benefits. Since the Social Security Act neither secures "equal rights" nor "civil rights", but merely entitlements, the denial of benefits could not give rise to a constitutional claim. Furthermore, since by its very terms, § 405(h) of the Social Security Act prohibits actions under 29 U.S.C. § 1331 or § 1346 to recover on any claim arising out of Title II of the Act, the plaintiff in Ostroff had no cause of action for consequential or punitive damages arising from the termination of benefits.

The court however found that a Bivens-type action would lie if Ostroff had alleged or suffered a denial of procedural due process:

> . . . the only possible con-

> stitutional claim that the plaintiff might have is that the defendants denied him procedural due process.

Thus the Ostroff court endorsed the viability of an action arising independently of the Social Security Act, and derived directly from the Constitution based on a violation of the 5th Amendment.

On the facts of Ostroff, the court found that there was no cause of action pursuant to Bivens because Ostroff did not allege a constitutional violation, and had in fact been afforded due process. In contradistinction to Ostroff, however, in Mrs. Nixon's case, a violation of due process has been alleged in the complaint and, the facts illustrate a most grotesque contortion of Mrs. Nixon's constitutional rights to notice and an opportunity to be heard. In fact, Magistrate Bagwell stated in his

letter that "[i]f the claims are true, the case would be an unusually stark example of Federal Government Bureaucratic bullheadedness."

Thus, this case falls within the ambit of Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981), which is endorsed both in Ostroff (see footnote 9 at 353) and in plaintiff's brief. Ellis v. Blum, like Ostroff, mandates that if claim does not relate to the substantive disability determination (which is barred by § 405(b)), but to the termination notice procedures then the plaintiff has a valid constitutional claim arising directly from the Fifth Amendment to the Constitution pursuant to the doctrine of Bivens. Thus, it is irrelevant and outside of the scope of this inquiry whether Congress has authorized the above

suit either pursuant to the Social Security Act or any other statute, since jurisdiction is derived from the Constitution.

Enclosed is a copy of the brief which we submitted to Magistrate Bagwell which more fully sets forth our position.

Very truly yours,

L. Vastine Stabler, Jr.

/msw
Encl.
cc: Hon. David A. Bagwell
Mr. J. B. Sessions, III
Mr. Thomas H. Figures
Mr. W. W. Dinning

APPENDIX E

SOCIAL SECURITY
TERMINATION NOTICE

From: Office of Disability Operations
Baltimore, Maryland 21241 04 C2

Date: 08 JAN 1982

LILLIAN T. NIXON
905 S MAIN AV
DEMOPOLIS AL 36732

Claim Number:
419-22-8055 HA

THE LAW PROVIDES THAT AN INDIVIDUAL'S DISABILITY PERIOD SHALL END IF THE PERSON IS ABLE TO DO SUBSTANTIAL GAINFUL WORK. THE LAW ALSO PROVIDES THAT AN INDIVIDUAL WILL RECEIVE BENEFIT PAYMENTS FOR THE MONTH DISABILITY ENDS AND THE FOLLOWING TWO MONTHS. THE MEDICAL EVIDENCE IN YOUR CASE SHOWS THAT YOU BECAME ABLE TO DO SUBSTANTIAL GAINFUL WORK IN OCT 1981. ACCORDINGLY, THE LAST DISABILITY BENEFIT PAYMENT TO WHICH YOU ARE ENTITLED IS FOR THE MONTH OF DEC 1981. THIS DETERMINATION IS BASED ON ALL THE EVIDENCE IN YOUR FILE, INCLUDING ANY ADDITIONAL EVIDENCE

YOU MAY HAVE SUBMITTED. THE DECISION ON YOUR CLAIM WAS MADE BY THE SOCIAL SECURITY ADMINISTRATION ON THE BASIS OF A DISABILITY DETERMINATION BY AN AGENCY OF THE STATE IN WHICH YOU LIVE. PHYSICIANS AND OTHER TRAINED DISABILITY EVALUATION PERSONNEL IN THE STATE AGENCY PARTICIPATED IN MAKING THIS DETERMINATION.

SINCE YOU ARE NO LONGER ENTITLED TO BENEFITS, YOUR HOSPITAL AND MEDICAL INSURANCE COVERAGE UNDER MEDICARE ENDS THE LAST DAY OF FEB 1982. PLEASE DESTROY YOUR HEALTH INSURANCE CARD AFTER THE LAST DAY OF COVERAGE INDICATED ABOVE.

YOU WILL BE NOTIFIED AT A LATER DATE IF AN UNDERPAYMENT OR OVERPAYMENT OF BENEFITS EXISTS ON YOUR CLAIM.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR CLAIM, YOU MAY GET IN TOUCH WITH ANY

SOCIAL SECURITY OFFICE. MOST QUESTIONS CAN BE HANDLED BY TELEPHONE OR MAIL. IF YOU VISIT AN OFFICE, HOWEVER, PLEASE TAKE THIS NOTICE WITH YOU.

ENCLOSURE - SSA 05-10058

IMPORTANT INFORMATION

If You Disagree With This Decision

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

Information About Overpayments

If you have been overpaid and you cannot afford to refund the full overpayment at one time get in touch with any social security office to see about repayment by installments.

Any overpayment must be paid back unless both of the following statements are true:

--The overpayment wasn't your fault in any way and you accepted the payment(s) because you thought they were correctly paid, and

--You couldn't meet your necessary living expenses if you had to pay back the overpayment or if it would be unfair for some other reason.

If you believe you were without fault and that you should not have to repay the money, you should call, write, or visit any social security office to discuss the matter. The people there may ask you about your assets, monthly income, and expenses to help decide whether repayment would cause you financial hardship.

If You Again Become Disabled

If your condition again prevents you from doing substantial gainful work before age 65, you should get in touch with any social security office about filing a new application for disability benefits. If you apply promptly and are again found entitled to disability benefits, your benefit payments may start with the first full month in which you were again disabled.

If You Are Now Age 62 Or Over

Retirement benefits are payable at a reduced rate as early as age 62. If you are age 62 or over, you may wish to ask the people in any social security office for more details.

APPENDIX F

Excerpt from Notice of Termination form dated March 4, 1982 and addressed to Lillian Nixor:

In view of your request for reconsideration, all the information about your claim has been carefully evaluated. It has been determined that the previous decision was proper under the law

A period of disability was established for you beginning October 1969. The law provides that an individual's disability period shall end if the person is able to do his or her usual occupation or any other kind of substantial work considering the person's age, education and work experience. The law also provides that an individual will receive benefit payments for the month disability ends and the following two months. The evidence in your case shows that you became able to do substantial gainful work in

February, 1982. Therefore, it has been determined that entitlement to disability benefits ended with the month of April, 1982.

On reconsideration, all the evidence was reviewed, and no condition was disclosed that would prevent you from working.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any Social Security office. Read the enclosed leaflet for a full explanation of your right to appeal.

/mj
Enclosure:
SSA Pub. No. 70-10282 C98

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
Lillian T. Nixon	419-22-8055

The following medical reports were used in considering your claim: Dr. N. E. Perret's report of September 9, 1981; Whitfield Memorial Hospital's report of June 25, 1981 to September 29, 1981 and report taken by telephone February 22, 1982 with Dr. R. M. Holifield's office.

The evidence shows that you died February 19, 1982. A review of the medical evidence shows that you were disabled due to your peptic ulcer disease up to your date of death. After that time no disability issue exists.

The statement of evidence in the determination of December 2, 1981, except as modified herein, is hereby incorporated by reference, but not the inferences, findings or conclusions thereon.

This decision reopens, revises and reverses the decision of December 2, 1981. The termination of benefits was based on insufficient evidence based on failure to appear for a consultative examination. Her physician stated that she was unable to go to an examination due to weakness. Due to ulcer disease, this condition ultimately resulted in death February 19, 1982. Therefore it would appear that an error was made and disability should have continued until February 19, 1982, the date of death.

Type of Claim
DIB

Disability Examiner DDS	Date
RMB	3/3/82
Review Physician DDS	Date
(Illegible)	(Illegible)

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-834

In the Supreme Court of the United States

OCTOBER TERM, 1985

H. G. NIXON, ADMINISTRATOR OF THE ESTATE OF LILLIAN T. NIXON, PETITIONER

v.

MARGARET M. HECKLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
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Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-834

H. G. NIXON, ADMINISTRATOR OF THE ESTATE OF LILLIAN T. NIXON, PETITIONER

v.

MARGARET M. HECKLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, as administrator of the estate of his wife, brought this personal damages action against respondent, the former Secretary of Health and Human Services, claiming that his wife's due process rights were violated in connection with her receipt of a notice that her Social Security disability benefits would be terminated. Petitioner contends that the courts below erred in dismissing the suit.

1. a. As part of a review of disability cases in August 1981, the Alabama Department of Education, Disability Determination Division, asked petitioner's wife (Mrs. Nixon) to provide medical evidence of her continuing disability. Mrs. Nixon responded by filing a Social Security Disabled Person Report, which was received by the state

agency on August 25, 1981. Mem. Exh. A.[1] A consulting physician examined Mrs. Nixon on behalf of the state agency and expressed the view that she was disabled (Mem. Exh. B; Pet. 13), and other medical reports also were submitted (Mem. Exh. C). Two additional examinations were scheduled in October 1981—one with a second consulting physician and another with a hospital (Mem. Exh. D)—but Mrs. Nixon failed to appear for either (Mem. Exh. E; Pet. 13). By letter dated November 16, 1981, the state agency informed Mrs. Nixon that the record indicated that she was able to work and that the evidence in the file was "not sufficient to determine the current severity of your impairments" (Supp. Mem. Exh. 1). The state agency therefore informed Mrs. Nixon that her disability benefits would be terminated unless she submitted additional evidence within 10 days (*ibid.*). Mrs. Nixon did not submit any additional information (Supp. Mem. Exhs. 1, 2).

On December 2, 1981, the state agency recommended that the Social Security Administration (SSA) terminate Mrs. Nixon's benefits (Mem. Exh. E). The recommendation stated (*ibid.*):

> Considering all evidence of record, medical documentation is not sufficient to determine the current severity of the claimant's impairments. Therefore it is recommended that disability benefits be ceased since the claimant failed to report to consultative examinations. Due process has been accomplished.

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[1] "Mem." refers to the memorandum in support of defendant's motion to dismiss or, in the alternative, motion for summary judgment, filed in the district court on August 5, 1984. "Supp. Mem." refers to the supplemental memorandum brief in support of the United States' motion for summary judgment and/or motion to dismiss, filed in the district court on October 9, 1984. We have lodged a copy of these memoranda (and exhibits thereto) with the Clerk of this Court.

Based on the state agency's recommendation, SSA sent a notice to Mrs. Nixon dated January 8, 1982. The notice explained that her benefits would be terminated as of the end of December 1981 because "[t]he medical evidence in your case shows that you became able to do substantial gainful work in October 1981" (Pet. App. A13). The notice also informed Mrs. Nixon that she could request reconsideration of the initial determination within 60 days (*id.* at A16). Mrs. Nixon requested reconsideration on January 25, 1982 (Mem. Exh. G).

Mrs. Nixon died on February 19, 1982 (Pet. App. A21). Thereafter, in its reconsideration decision dated March 3, 1982, SSA concluded that Mrs. Nixon had been disabled up to the date of her death (*ibid.*). The supporting rationale prepared by the state agency explained that the prior termination of benefits "was based on insufficient evidence based on failure to appear for a consultative examination" (*ibid.*; Mem. Exh. I, at 2).

b. Petitioner then brought this *Bivens*[2] suit against respondent, who then was the Secretary of Health and Human Services, in the United States District Court for the Southern District of Alabama. Invoking the district court's jurisdiction under 28 U.S.C. 1331, petitioner sought damages for an alleged due process violation in connection with the termination of Mrs. Nixon's benefits (Complaint 4; Pet. 16-17; Pet. App. A6-A12). Petitioner contended that the termination notice was inaccurate because it did not state that Mrs. Nixon's benefits would be terminated as a result of her failure to appear at the consultative examinations and that the termination notice caused emotional distress,

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[2] *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

which contributed to her death.[3] The district court, adopting the magistrate's recommendation, held that the exclusive review provisions of 42 U.S.C. 405(h) with respect to claims arising under the Social Security Act deprived the district court of jurisdiction over this suit under 28 U.S.C. 1331 (Pet. App. A2-A4). The court of appeals affirmed without opinion (*id.* at A1).

2. The court of appeals correctly affirmed the dismissal of this suit. Petitioner's claim for damages against former Secretary Heckler is frivolous, and the court of appeals' unpublished judgment order presents no issue warranting review by this Court.

a. Petitioner's claim for damages against former Secretary Heckler is frivolous.[4] As an initial matter, although petitioner seeks damages against former Secretary Heckler in her personal capacity, he has not identified any personal involvement by her in the drafting of the particular notice that was sent to his wife. Indeed, petitioner expressly recognizes that respondent "might in fact not be the proper defendant in this case" (Pet. 17 n.3). It is clear that in the absence of any personal involvement, respondent may not be held liable in damages for a constitutional tort. See *Brandon* v. *Holt*, No. 83-1622 (Jan. 21, 1985), slip op. 6-7; *Ellis* v. *Blum*, 643 F.2d 68, 85 (2d Cir. 1981). Thus, even assuming that a due process violation occurred, there would

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[3]See Br. in Opp. to Gov't Mots. to Dis. or for Summary Judgment 6, 13, 15-16, 17-18. Petitioner also sought to recover damages from the United States under the Federal Tort Claims Act, but he has abandoned that claim. See Pet. 17-18 & n.3.

[4]To the extent that the complaint can be read to state a claim against the United States, such a suit is barred because Congress has not waived the sovereign immunity of the United States to suits for damages based on an alleged violation of the Due Process Clause. *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976).

be no basis for the recovery of damages against respondent. She accordingly should not be subjected to the burden of any further proceedings in this case.

Moreover, petitioner's due process claim is wholly unsubstantial. His argument is premised entirely on the notion that Mrs. Nixon should have been specifically notified that her benefits would be terminated because she failed to appear for the two scheduled consultative examinations. If Mrs. Nixon had been so notified, petitioner contends, she would have been afforded the opportunity at the reconsideration stage to explain her absence; instead, she submitted additional evidence of disability at the reconsideration stage. See Pet. 22-23. There are numerous flaws in this contention:

First, contrary to petitioner's assertion (Pet. 21-23), the state agency's recommendation to SSA that Mrs. Nixon's benefits should be terminated was not based solely on her failure to report for the consultative examinations. The state agency relied on the fact that this failure in turn left the agency with insufficient evidence on which to find her disabled. See Mem. Exh. E; Pet. App. A22, quoted at page 2, *supra*. Because Mrs. Nixon bore the burden of establishing her continuing eligibility (*Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976)), this defect required the state agency to find that she was able to engage in substantial gainful activity. That is exactly what the January 8, 1982 termination notice stated. There accordingly was no inaccuracy in the termination notice and thus no predicate for a due process claim.

Second, Mrs. Nixon in fact had been given ample warning prior to her receipt of the January 8, 1982 notice that her benefits would be terminated. The purpose of the consultative examinations Mrs. Nixon failed to attend was to cure the deficiencies in the record. See Pet. App. A22. After

Mrs. Nixon failed to appear, the state agency informed her that the evidence then in the file indicated that she could work, that there was insufficient evidence to determine the severity of her impairments, and that she had 10 days within which to furnish additional information. See page 2, *supra*. Thus, Mrs. Nixon was fully notified that her claim would be denied because of insufficient evidence, and her benefits were terminated only after she failed to respond.

Third, after Mrs. Nixon received the termination notice, she requested reconsideration of that decision. As petitioner concedes (Pet. 22-23), additional evidence of her disability was submitted at the reconsideration stage, and benefits then were continued to the date of her death. Thus, any deficiency in the state agency's initial decision did not prevent Mrs. Nixon from receiving actual notice of the termination and of her right to further review. Nor did it prevent her from then seeking further review. The notice therefore had no lasting impact on the processing of her claim.

Fourth, petitioner erroneously relies (Pet. 22) on a regulation that provides that an individual's benefits may be terminated if he fails to attend a scheduled consultative examination. That regulation states that if a claimant has a "good reason" for missing the examination, he should tell SSA or the state agency as soon as possible. 20 C.F.R. 404.1518. Petitioner argues that the termination notice should have mentioned his wife's failure to appear at the scheduled consultative examinations so that she could have attempted to establish a "good reason" for that failure when she sought reconsideration of the initial denial of her claim. However, the regulation upon which petitioner relies makes clear that a claimant should inform SSA or the state agency of his inability to appear *before* the scheduled date of the examination. It does not contemplate that the claimant may simply fail to appear and then offer an explanation only

later if his claim is subsequently denied, as petitioner maintains.

b. Petitioner does not in any event have a cause of action for damages in the present circumstances. An individual whose claim for disability benefits is denied at the initial stage of the administrative review process has a right to seek reconsideration, an ALJ hearing, and Appeals Council review. He then has a right under 42 U.S.C. 405(g) to judicial review of the Secretary's final decision on his claim. These special statutory procedures have been finely tuned by Congress to accommodate the interests of claimants (*Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 8-14), and, as this Court has recognized, they provide a fully adequate remedy for the vindication of constitutional claims and the recovery of benefits due. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The existence of these elaborate procedures, as well as the potential consequences of private damages actions arising under an administrative program in which more than two million claims are processed annually, counsel strongly against judicial implication of a damages remedy in this setting. Compare *Bush* v. *Lucas*, 462 U.S. 367 (1983).

In addition, under 42 U.S.C. 405(h), the judicial review provision in 42 U.S.C. 405(g) is exclusive, and "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." Because petitioner invoked the district court's jurisdiction under 28 U.S.C. 1331, Section 405(h) reinforces the conclusion that petitioner has no cause of action against respondent.

Petitioner argues (Pet. 28-34) that this suit is not barred by Section 405(h) because he does not seek an actual award of Social Security benefits and because this suit arises under

the Due Process Clause, not the Social Security Act. Contrary to petitioner's contention, however, the jurisdictional preclusion in Section 405(h) cannot be avoided simply because the plaintiff casts his allegations in constitutional terms. See *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975). The Court recently adhered to this view in *Heckler* v. *Ringer*, 466 U.S. 602 (1984), holding that a constitutional challenge to the procedures utilized in the adjudication of claims "arises under" the Social Security Act for purposes of Section 405(h), even where the plaintiff does not seek an actual award of benefits. See 466 U.S. at 610 & n.7, 614-616.

Petitioner relies (Pet. 34-35) on *Ellis* v. *Blum*, 643 F.2d 68, 76 (1981), in which the Second Circuit concluded that Section 405(h) would not bar an action against state officials under 28 U.S.C. 1331 to recover damages for an alleged due process violation in the initial adjudication of disability claims under the Social Security Act. See also 643 F.2d at 85. However, the court in *Ellis* v. *Blum* admitted to considerable uncertainty regarding the applicable jurisdictional principles under the Social Security Act (643 F.2d at 73-75). Moreover, *Ellis* v. *Blum* was decided prior to *Ringer*, in which this Court rejected the notion that attaching a "procedural" or "constitutional" label to a legal issue renders the jurisdictional bar in Section 405(h) inapplicable.[5] Because intervening events have undermined the premises of *Ellis* v. *Blum* and because the unpublished judgment order of the court of appeals in the instant case does not even address the preclusion issue,[6] there is no clear circuit

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[5]Indeed, the separate opinion in *Ringer* quoted *Ellis* v. *Blum* for the proposition that Section 405(h) does not bar the exercise of federal question jurisdiction in a case raising only a "procedural" challenge. See 466 U.S. at 636-637 (opinion of Stevens, J.). As we have explained in the text, the majority in *Ringer* rejected that distinction.

[6]The brief of the appellee filed on behalf of respondent in the court of appeals argued in the alternative that there was no due process violation. See Appellee Br. 8-9.

conflict requiring resolution by this Court. Furthermore, the question whether a personal damages claim can be brought against the Secretary under 28 U.S.C. 1331, notwithstanding the preclusion of review in Section 405(h), does not appear to have arisen in any other appellate decision since *Ellis* v. *Blum* and *Ringer* were decided; it therefore is not of sufficient independent importance to warrant review by this Court.

Finally, as we have explained, this case does not present an appropriate occasion for the Court to consider the preclusion question, in light of the wholly frivolous nature of the underlying damages claim against former Secretary Heckler. If this Court is to fulfill the promise of *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978), that "[i]nsubstantial [*Bivens*] lawsuits can be quickly terminated" so that "federal officials are not harassed by frivolous lawsuits," this litigation should be put to an end.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1986

DOJ-1986-03

NO. 85-834 (3)

Supreme Court, U.S.
FILED
APR 9 1986
JOSEPH F. SPANIOL, JR
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

H. G. NIXON, as Administrator of the Estate of Lillian T. Nixon, deceased,

Petitioner,

vs.

MARGARET HECKLER, Secretary, Department of Health and Human Services,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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NO. 85-834

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SUPREME COURT OF THE UNITED STATES

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Petitioner,

vs.

MARGARET HECKLER, Secretary, Department of Health and Human Services,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

ADDITIONAL REGULATIONS CITED

If you do not give us the medical and other evidence that we need and request, we will have to make a decision based on information available in your case. We will not excuse you from giving us evidence because you have religious or personal reasons against medical examinations, tests, or treatment.

20 C.F.R. § 404.1516

****

(a) Notice of the examination. If your medical sources cannot give us sufficient medical evidence about your impairment for us to determine whether you are disabled or blind, we may ask you to have one or more physical or mental examinations or tests. We will pay for these examinations. However, we will not pay for any medical examination arranged by

you or your representative without our advance approval. If we arrange for the examination or test, we will give you reasonable notice of the date, time, and place the examination or test will be given, and the name of the person who will do it. We will also give the examiner any necessary background information about your condition when your own physician will not be doing the examination or test.

(b) Reasons why we may need evidence. We may need more medical evidence--

(1) To obtain more detailed medical findings about your impairment(s);

(2) To obtain technical or specialized medical information; or

(3) To resolve conflicts or differences in medical findings or assessments in the evidence we already have.

20 C.F.R. § 404.1517

ARGUMENT

Petitioner seeks a writ of certiorari to determine that the District Court has jurisdiction in a suit for damages arising out of a denial of procedural due process by the Social Security. The Secretary has replied by denying that Petitioner's cause of action is viable and averring that it is both legally and factually without basis.

The brief on behalf of the Secretary makes two general arguments which deserve a reply: I) That the claim of Mr. Nixon is frivolous and insubstantial and II) that unconstitutional abuse of process by the Secretary is not subject to judicial review even when the plaintiff's injury does not relate to an actual award of damages.

I. The claim of Mr. Nixon is substantial.

The Secretary assigns four reasons for the alleged frivolity of Mr. Nixon's claim. Each reason is unsound.

First, the Secretary states that the denial was not based solely on the allegation that Mrs. Nixon failed to meet a doctor's appointment but also because of insufficient evidence. (Respondent's Brief p. 5).

It should first be noted that the suggestion that there was insufficient evidence of disability is ludicrous. The final Disability Determination Rationale reveals that the DDD had received two pieces of medical evidence before the January 8, 1982, notice to Mrs. Nixon (Mem. Exh. I):

1. A report of Dr. N. E. Perret dated September 10, 1981. Dr. Perret was

a consultant hired by the DDD who examined Mrs. Nixon and reported general arteriosclerosis, malnutrition associated with a probable gastric outlet obstruction, severe peripheral vascular insufficiency, severe arthritis, and a history of various operations. He concluded, "I firmly believe she is definitely totally and permanently disabled." (Mem. Exh. B).

2. The Whitfield Memorial Hospital record. The record showed that Mrs. Nixon was hospitalized between June 26, 1981 and July 21, 1981 and between September 26, 1981 and October 8, 1981.[1/] (Mem. Exh. C). Then she was admitted on complaints of abdominal pain and vomiting. The diagnosis was recurrent duodenal

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[1/] Ironically the termination notice of January 8, 1982 claimed that the medical evidence showed she was able to return to work on October 1, at which time Mrs. Nixon was residing in Whitfield Memorial Hospital.

ulcer with partial duodenal obstruction, dehydration, and malnutrition. The second hospitalization was based on a diagnosis of active peptic ulcer disease, Zollinger-Ellison Syndrome, acute sprained lumbar spine, moderately severe osteoarthritis of the back and knee, and chronic thrombophlebitis in her legs. Her regular doctor stated that she was totally and permanently disabled. (Mem. Exh. C).

Even if we accept on its face the assertion of insufficient evidence, the regulations make clear that insufficient evidence standing alone is not a basis of denial but rather a predicate for additional medical examination. § 404.1517. The claim is denied for insufficient evidence only when there is a willful refusal to submit evidence § 404.1516 or there is refusal without good cause to take

part in a consultative examination. § 404.1518.

Second, Mr. Nixon's claim is allegedly frivolous because Mrs. Nixon had been given ample warning that her benefits would be terminated. Respondent's Brief p. 5. Mr. Nixon agrees that his wife was warned that she would lose her benefits. Indeed the thrust of her dilemma was that she was told she would lose her benefits but was not told the true reason for her denial. The letter to which the Secretary alludes contains the same untrue statement as does the social security notice. On November 16, 1981, the examiner wrote:

> Although you indicated on the report you recently completed for us that you did not feel your condition had improved so that you are able to return to work, the other information and evidence in your case shows that you are able to work and have been since October, 1981. (emphasis added)

(Supp. Mem. Exh. 1).

When the Social Security finally disclosed the medical reports used in considering Mrs. Nixon's claim, no evidence showing her ability to work was forthcoming. Moreover, no document reveals that a lack of response to the November 16 letter was ever material to the decision. (Mem. Exh. I).

Third, the claim is deemed frivolous because Mrs. Nixon "requested reconsideration . . . additional evidence of her disability was submitted at the reconsideration stage, and benefits then were continued to the date of her death." (Respondent's Brief p. 6). To make the point is to misconceive the claim. The illegal misuse of the statutory and constitutional duties of the Social Security Administration creates the breach of a legal duty which must be remedied. The Court's following statement in Mathews v.

Eldridge, 424 U.S. 319, 331 (1976) is equally applicable here: "Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." When six narcotic agents carried the innocent Mr. Bivens off to jail, they could not undo the wrong simply by unlocking the jail door and giving him a handshake. Neither could the Secretary erase the harm to Mrs. Nixon by advising her that she was dead and returning her "pennies."

The Secretary's fourth claim of frivolity is based on an assertion that Petitioner erroneously relies on the regulation which permits a claimant to provide a "good reason" for missing an examination. (Respondent's Brief p. 6-7).

The Secretary apparently argues that even if Mrs. Nixon had a good reason for failure to attend (e.g. illness, failure to receive timely notice, being furnished incorrect or incomplete information, or death or serious illness in the family) then her benefits were permanently forfeited.[2/] The Secretary, in making such an Orwellian interpretation, ignores the operative portion of Rule 404.1518: "If you are already receiving benefits and do not have a good reason for failing or refusing to take part in a consultative examination or test which we arranged

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[2/] Nowhere does the Record reflect that, as a matter of fact, the DDD ever notified Mrs. Nixon of the setting of the two appointments (if any such record of notification existed, we would think that the Secretary would certainly have inserted it in the record). The record does reflect that the DDD notified the two medical organizations which were appointed to make the examinations (Mem. Exh. D) but there is no record of any sort that the DDD remembered to notify Mrs. Nixon.

for you, we may determine that your disability or blindness has stopped because of your failure or refusal." The failure to have a good reason is thus a condition precedent for denying benefits on that ground, which suggests that the Social Security Administration has the burden of establishing that Mrs. Nixon did not have a good reason.

Furthermore, the actions of the Social Security Administration in this case demonstrate that they do not follow the course of conduct urged in the Secretary's Response to the Petition. After Mrs. Nixon died, her physician reported the death to the DDD and the field disability determination rationale states: "Her physician stated that she was unable to go to an examination due to weakness." The excuse was accepted. If the Secretary's position that good reason must be

given before the date of the appointment were correct, the late advice as to why she failed to attend would have been inadequate.

This case was interrupted in the District Court by the early refusal of the District Court to take jurisdiction of the case. The plaintiff was thus not allowed the opportunity to present medical and lay evidence of the anguish caused Mrs. Nixon, who, when struggling with various life threatening but not necessarily fatal diseases was notified that the Social Security had concluded that the "medical evidence showed" that she was physically able to return to work on a given date. The case is yet to be developed as to the impact on this desperate woman who was told that there was medical evidence to the effect that her claim of disability was without merit. She never

lived to know that a cruel joke had been played on her. No medical evidence ever showed that she was no longer disabled. Only a bureaucratic technicality was involved and she was being punished by the denial of her pension because she apparently did not rise up from her convalescent bed and go to Montgomery to see another doctor and another hospital to learn whether they might agree with the first consultant who found her to be totally disabled. Plaintiff has not yet had the opportunity to present the evidence of the medical causation of the events which led to her death.

II. The unconstitutional abuse of process is subject to judicial review.

The Secretary argues that it was decided in Heckler v. Ringer, 466 U.S. 602 (1984) ". . . that a constitutional challenge to the procedures utilized in

the adjudication of claims 'arises under' the Social Security Act for purposes of Section 405(h), even where the plaintiff does not seek an actual award of benefits." (Respondent's Brief p. 8). In effect, the Secretary is maintaining that she can violate the constitutional rights of Mrs. Nixon and preclude her estate from seeking judicial relief. The Secretary draws a misleading conclusion from the case. In Heckler v. Ringer, a necessary ancillary part of the Court's decision was the availability of an alternative administrative procedure culminated by access to the courts through Section 405(g) of the Social Security Act. See Heckler v. Ringer, supra at 608, n. 4. Such is not the case here.

The Secretary is silent with respect to any comprehensive scheme specifically designed to provide full compensation to Social Security beneficiaries who are

injured or damaged as a result of violation of due process. See Bush v. Lucas, 462 U.S. 367 (1983). That silence is compelled by the fact that there is no such procedure. Section 405(g) relates only to an administrative process beginning with an initial determination of benefits and reconsideration and appeal of the correctness of that determination. It does not in any way provide for redress of the consequences of abuse of the process by governmental officials.

The Secretary states that the "statutory procedures have been finely tuned by Congress to accomodate the interests of claimants" and that "[T]he existence of these elaborate procedures . . . . counsel strongly against judicial implication of a damages remedy in this setting." (Respondent's Brief p. 7). In other words the Secretary alleges that Mrs. Nixon did

not follow the "finely tuned" procedure set up by the Congress. Actually, it is the Social Security Administration which did not follow the proper procedure.

The Secretary made a curious man bite dog argument when she suggested that protection is required so that "federal officials are not harrassed." [Respondent's Brief p. 9, quoting Butz v. Economou, 438 U.S. 478, 507-508 (1978)]. Where is the procedure to protect Social Security beneficiaries who are harrassed by the cynical indifference of Social Security officials who deem the lifetime savings of a school teacher to be frivolous and treat her that way? It is not to be found within the confines of Section 405(g).

The Secretary warns of the potential consequences of private damage actions arising under an administrative program in which more than two million claims are

processed annually. (Respondent's Brief p. 7). The answer to that warning is not self-evident without knowing the extent to which the program complies with its legal and constitutional obligations. If the Secretary implies that conduct such as that which is involved here is common within the program, then many lawsuits can be anticipated. In such circumstances hopefully the Social Security program will set its house in order.[3/] If, on the other hand, it is common for the Social Security program to comply with the rules, then perhaps Mrs. Nixon's situation is an aberration, in which case

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[3/] It is hard to believe that a different rule would apply in the Bivens case on the ground that narcotic agents routinely and frequently break into homes of innocent people without warrant or probable cause and it would be a hardship on narcotic agents to compensate the innocent victims because it happens so often.

her husband's injuries would be compensated but there would be very little impact on the program.

III. This case is important.

The positions taken by the Secretary underline the over-extension of the authority of cases such as Ringer which has taken place in the lower courts. The government takes the position that the courts in effect do not have the jurisdiction to entertain actions testing the compliance by government officers with their statutory and constitutional duties. The decision in the court below reflects a confusion between exhaustion of remedies, which permits the agency to utilize its procedures before a case reaches the courts, and outright preclusion of judicial

review.[4/] By invoking exhaustion of remedies in a case where there is no other remedy, the court below has snuffed out judicial review of unconstitutional actions by a public official. This ruling invades the axiomatic premise stated by Chief Justice John Marshall:

> The judicial power of the United States is extended to all cases arising under the constitution.
>
> Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
>
> This is too extravagant to be maintained.

Marbury v. Madison, 1 Cranch 137, 178-9 (1803)

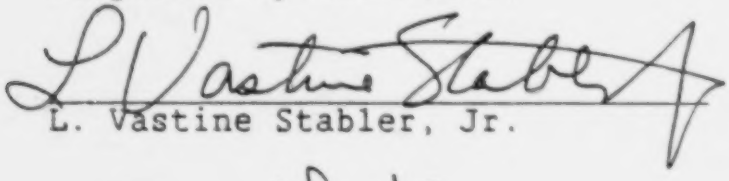
[4/] The Secretary suggests that the Eleventh Circuit might not have been ruling on the preclusion issue, because it issued an unpublished judgment. (Respondent's Brief p. 8 at n. 6). However, the District Court denied jurisdiction based on preclusion under § 405(h). The Eleventh Circuit affirmed. The District Court' order and the Magistrate's opinion remain unaltered.

We submit that review of this case will give the Court the opportunity to reaffirm the time-honored principles of judicial supremacy with respect to review of conduct which is to be measured by the Constitution of the United States.

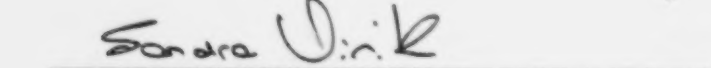
CONCLUSION

Petitioner respectfully submits that the petition for a writ of certiorari be granted.

Respectfully submitted,



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